



The following constitutes
the order of the court. Signed May 11, 2012

A handwritten signature in black ink, appearing to read "William J. Lafferty, III".

William J. Lafferty, III
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

In re Larry Keith Leonard,)
Kimberlee Tylar Leonard,)
)
)
Debtors.)
_____)

Case No. 11-72978
Chapter 7

MEMORANDUM OF DECISION RE TRUSTEE'S OBJECTION TO CLAIM OF EXEMPTION

This matter came for hearing on March 14, 2012 on the Trustee's Objection to Debtors' Claim of Exemption. The Trustee objected to the Debtors' claim of exemption with respect to an interest in what is described as an "annuity" (the "Annuity") payable from Metropolitan Life Insurance Company in the approximate amount of \$15,250, on two bases: (a) that the Debtors had impermissibly modified the basis for their claims of exemption from those assertable under Section 704.010 of the California Code of Civil Procedure ("CCP") to those assertable under CCP Section 703.140 et seq., and (b) that the exemption which the Debtors purported to utilize, CCP Section 703.140(b)(10)(E), is inapplicable to exempt an interest in the Annuity. At the

1 conclusion of the hearing, the Court took the matter under
2 submission to consider the arguments of counsel and the relevant
3 authorities. After due consideration, the Court sustains the
4 Trustee's Objection, for the reasons set forth below.

5 As background, the Debtors filed for relief under chapter 7 of
6 the United States Bankruptcy Code on December 13, 2011. Concurrent
7 with the filing of the case, Debtors filed their Schedules of
8 Assets and Liabilities, including Schedule "B", which lists
9 interests in personal property, and Schedule "C", which lists
10 property which the Debtors claim as exempt. Neither Schedule "B"
11 nor Schedule "C" as originally filed, included any reference to the
12 Annuity.

13 The existence of the Annuity came to light during the First
14 Meeting of Creditors in this case, held on January 13, 2012. Upon
15 learning of the Annuity, the Trustee's counsel took steps to claim
16 the asset for the estate. Debtors' counsel, on the other hand,
17 filed an Amended Schedule "B", which listed the Annuity under
18 subpart "10" ("Annuities"), and an amended Schedule "C", which
19 listed the Annuity as exempt under CCP Section 703.140(b)(10)(E).
20 Trustee then filed this Objection.

21 The Trustee first asserts that having initially chosen to
22 claim the exemptions available to debtors under CCP Section 704.010
23 et seq. (the so-called "State Scheme"), the Debtors should be
24 precluded from modifying their exemption requests to claim those
25 available under CCP Section 703.140 et seq. (the so-called "Opt-Out
26 Scheme"), on the theory that the initial claim of exemptions
27 constituted an "election of remedies." This Court does not agree.

1 Initially, courts in the Ninth Circuit recognize a liberal
2 right to amend claims of exemption. See *In re Michael*, 163 F.3d
3 526, 529 (9th Cir. 1998)(citation omitted). Although the Trustee
4 concedes this general doctrinal point, the trustee argues that the
5 result should be different where debtors do not merely amend their
6 exemption claims within the same general format, but purport to
7 switch the schemes under which they claim exemptions, citing *In re*
8 *Reaves*, 285 F.3d 1152, 1157 (9th Cir. 2002). The Court does not
9 find *Reaves* apposite.

10 In *Reaves*, the Ninth Circuit upheld a debtor's claim of
11 exemption over a creditor's objection that, by having chosen to
12 invoke the California state law exemptions pre-petition (which
13 were, obviously, the only exemptions available to her at the time)
14 the debtor had effectively "elected her remedies" and could not
15 chose the "Opt-Out Scheme" of exemptions post-petition. The Ninth
16 Circuit ruled that the election of remedies doctrine did not
17 pertain to the facts presented because the debtor had not chosen
18 between two conflicting and equally-available means of exempting
19 assets; rather, she had chosen an alternative scheme of exemptions
20 that became available to her *only after she filed bankruptcy*.

21 While the Court understands the Trustee's desire to
22 extrapolate from the holding in *Reaves* a corollary proposition that
23 a debtor, having chosen, post-petition, one scheme of exemptions,
24 should be precluded from making a wholesale "switch," this Court
25 will nonetheless resist the urge to expand the holding in *Reaves*,
26 especially in light of the general doctrine of liberal amendment of
27 exemptions. The Court is convinced that such restraint is
28 appropriate particularly where, as here, it appears that the

1 initial "election" of an exemption scheme was based upon a genuine
2 misunderstanding concerning the nature of the Debtors' assets, and
3 not any sort of dilatory behavior or attempts to "hide the ball."

4 With respect to the second issue, however, the Court has
5 determined that the Annuity does not qualify for exemption under
6 CCP Section 703.140(b)(10)(E).

7 The language of CCP Section 703.140(b)(10)(E) exempts the
8 debtor's right to receive "[a] payment under a stock bonus,
9 pension, profit-sharing, annuity or similar plan or contract on
10 account of illness, disability, death, age or length of service, to
11 the extent reasonably necessary for the support of the debtor and
12 any dependent of the debtor."

13 As background, the Annuity was taken out by Mary Scott, Ms.
14 Leonard's mother, and the Debtors have been receiving payments as
15 an inheritance under the Annuity since 2000, after Ms. Scott's
16 death in late September 1999. Schedule "I" indicates that Mr.
17 Leonard is a self-employed contractor, and does not indicate a
18 profession for Mrs. Leonard. Nothing in the Schedules or Statement
19 of Financial Affairs indicates that either Debtor is retired, or is
20 of an age when one might expect to retire from employment.

21 The literal language of CCP Section 703.140(b)(10)(E) would
22 appear to cover the Annuity, at least in large part. There is no
23 disagreement that the asset is an annuity, or that it is payable
24 "on account of death." And the Debtors have stated that the income
25 from the Annuity is necessary for their support.

26 The Trustee argues that the fact that the Annuity is in effect
27 an inheritance from a third party automatically disqualifies the
28 asset from exemption under CCP Section 703.140(b)(10)(E), citing

1 the case *In re Greenfield*, 289 B.R. 146 (Bankr. S.D. Cal. 2003).
2 This Court does not agree that the mere fact that the Annuity
3 payments result from an inheritance automatically disqualifies it
4 from exemption.

5 However, the Court agrees with that portion of the opinion in
6 *Greenfield* that focuses on the *purpose* of an IRA, stock bonus,
7 pension, profit sharing plan and annuity, and the reasoning behind
8 exempting those assets, i.e., that they are "aimed to enable
9 working taxpayers to accumulate assets during their productive
10 years so they might draw upon them during retirement." *Id.* at 149-
11 150 (citations omitted); see also, *In re McKown*, 203 F.3d 1188,
12 1190 (9th Cir. 2000). There is simply no evidence to support the
13 proposition that either of these Debtors is currently eligible for
14 retirement, or that this asset, on account of which these Debtors
15 have been receiving monthly payments for the past twelve years,
16 represents an accumulation of assets intended to support their
17 retirement within the meaning of CCP Section 703.140(b)(10)(E), as
18 set forth in *Greenfield*.

19 Accordingly, the Trustee's Objection to Exemption is sustained
20 with respect to the Annuity. Counsel for the Trustee is hereby
21 instructed to submit a proposed form of order in accordance with
22 this decision.

23 **END OF DOCUMENT**
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